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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, ~~1948~~ 1949

No. [redacted] 44

HEMAN MARION SWEATT,

Petitioner,

vs.

THEOPHILIS SHICKEL PAINTER, *et al.*

BRIEF OF AMERICAN VETERANS COMMITTEE (AVC) Amicus Curiae

IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF TEXAS

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MAY 25, 1949,
Washington, D. C.

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SWEATT v. PAINTER

OCTOBER TERM, 1948

No. 667

BRIEF OF AMERICAN VETERANS COMMITTEE (AVC) Amicus Curiae

The American Veterans Committee, Inc. (AVC), as *amicus curiae* respectfully requests this Court to (1) grant Sweatt's petition for certiorari, (2) specifically request argument with respect to the terms of the mandate which should be issued if the decision below is reversed, and (3) give special consideration to the nature of the mandate upon such reversal.

The American Veterans Committee, Inc. (AVC) is an organization of veterans of World War II who have associated themselves to promote the democratic principles for which they fought, including the elimination of racial discrimination.[1] AVC believes that the racial discrimina-

[1] AVC's basic aims are set forth in the Preamble to the AVC Constitution adopted at its First National Convention at Des Moines, Iowa, June 14-16, 1946:

"We as veterans of the Second World War associate ourselves regardless of national origin, creed or color for the following purposes:

"To preserve the Constitution of the United States; to insure the rights of free speech, free press, free worship, free assembly and free elections; To provide thorough social and economic security to all; To maintain full production and full employment in our country under a system of private enterprise in which business, labor, agriculture and government cooperate; To promote peace and good will

tion perpetrated by the State of Texas and permitted by the court below is incompatible with our democratic faith and is inimical to the welfare of the United States.

Sweatt applied for admission to the University of Texas Law School on February 26, 1946. He measured up to the required standards for admission scholastically and in all other respects except that of race. He was refused admission only because of his race. Subsequently, after protracted litigation, the State of Texas set up an inferior make shift "law school" for him. If Sweatt were a white man he would have been admitted to the University of Texas Law School years ago and would by now probably have been graduated. White qualified applicants who had applied at the same time as Sweatt are now practicing law. The refusal by the State of Texas to permit his admission to the University of Texas Law School thus raises important and fundamental questions with respect to the nature of the State's obligations to afford Negroes a legal education on the same conditions as such education is afforded to white persons.

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among all nations and all peoples; To support active participation of this nation in the United Nations and other world organizations whose purposes are to improve the cultural, commercial and social relations of all peoples; To provide such aid to disabled veterans as will enable them to maintain the position in society to which they are entitled; To provide such financial, medical, vocational and educational assistance to all veterans as is necessary for complete readjustment to civilian life; To resist and defeat all attempts to create strife between veterans and non-veterans; and to foster democracy. We dedicate ourselves to these aims, and for their attainment we establish this Constitution."

AVC's views in recent civil right cases before this Court are set forth in *amicus curiae* briefs in *Shelley* v. *Kraemer*, 334 U. S. 1 (1948); *Hurd* v. *Hodge*, 334 U. S. 24 (1948); *Takahashi* v. *Fish and Game Commission*, 334 U. S. 410 (1948); *United States* v. *C. I. O.*, 335 U. S. 106 (1948); and *Stainback* v. *Mo Hock Ke Lok Po*, 336 U. S. 368 (1949).

I. SPECIAL SIGNIFICANCE OF THIS CASE FOR VETERANS

This case has special significance for veterans. Both Negroes and whites served with distinction in the armed forces of the United States all over the world during World War II.[2] In recognition of their sacrifices and service, Congress granted educational benefits to them in the Servicemen's Readjustment Act of June 22, 1944, popularly known as the "G. I. Bill of Rights" (58 Stat. 284, as amended, 38 U. S. C. 693, Veterans' Regulation No. 1, part VIII, following 38 U.S.C. 739). In this Act, Congress made no distinctions as to race with respect to the veterans who could secure the benefits of the Act. These benefits will expire in a few years. For almost all of these war veterans, the last day they will be allowed to initiate study under the G. I. Bill of Rights is July 25, 1951, and no education or training will be afforded to them under that act after July 25, 1956. The refusal by certain states, as by Texas in this case, to admit Negroes to state institutions of higher learning on an equal basis with whites is not only repugnant to the Fourteenth Amendment but also frustrates the Congressional purpose that all veterans shall have equal opportunity to obtain the educational benefits which they have earned by their war-time services to the nation. Effectuation of the Congressional policy in this respect requires that the doors of existing state institutions for higher education be opened forthwith to Negro as well

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[2] *Army Service Forces Manual* M-5, "Leadership and the Negro Soldier" (Oct. 1944), pp. 9, 10, 23, 74-95; *To Secure These Rights*, The Report of the President's Committee on Civil Rights, pp. 83-84 (Govt. Printing Off., Oct. 29, 1947). Before voluntary enlistments were stopped in World War II, Negroes had volunteered for military service in ratios far exceeding their ratios in the nation's population. *Army Service Forces Manual* M-5, *supra*, p. 5. Inquiry from the Veterans Administration indicates that over 1,275,000 veterans of World War II are non-white.

as to white students. Equality of enjoyment of the educational benefits conferred by the national government upon the nation's veterans can be secured in no other way.

II. THE APPLICABILITY OF THE DOCTRINE OF "SEPARATE BUT EQUAL" TO EDUCATION HAS NEVER BEEN DECIDED. PLESSY v. FERGUSON DID NOT DO SO; AND ITS RATIONALE IS INCONSISTENT WITH THE FOURTEENTH AMENDMENT.

The courts of Texas justified the State's refusal to admit Sweatt to the University of Texas Law School on the theory that the State may fulfill its constitutional obligation to Negroes by providing them equal facilities in separate schools, and on the assumption that the State had actually provided Sweatt with the same opportunity for a legal education as is afforded to a white person. That theory and that assumption should, we believe, be reviewed and rejected by this Court in the light of the facts presented in this case.

The foundation for the decision below is *Plessy* v. *Ferguson*, 163 U. S. 537 (1896). That case involved a Louisiana statute requiring segregation of whites and Negroes on an intrastate train and is commonly regarded as the leading case sanctioning "separate but equal" facilities as sufficient under the Equal Protection Clause of the Fourteenth Amendment.

We do not believe that *Plessy* either involved or decided the issue in this case.

(1) In *Plessy*, both whites and Negroes, although separated, were on the same train and at least would arrive at their common destinations at the same time. (Compare *Railroad Company* v. *Brown*, 84 U. S. (17 Wall.) 445, 452 (1873) in which this Court held that providing separate cars

on the same train for whites and Negroes is "discrimination in the use of the cars.") In this case, however, Sweatt is *excluded* from the only real Law School in the State solely because he is a Negro.

(2) In *Plessy*, the Court was not presented with factual evidence either as to the reasonableness of distinctions based solely on race or as to inequalities which result from racial segregation. In this case, however, the evidence conclusively demonstrates that there is no reasonable basis for the compulsory exclusion of qualified applicants from the Law School solely on the basis of race and that the so-called segregation here involved results in gross inequalities in the opportunity to acquire a legal education.

(3) *Plessy* did not expound a general rule that "separate but equal" is equal protection in every area of human relations. Actually, *Plessy* correctly stated that it would be unconstitutional for a State to make unreasonable distinctions between white and colored people, such as "to require separate cars to be provided for people whose hair is of a certain color, or who are aliens, or who belong to certain nationalities, or to enact laws requiring colored people to walk upon one side of the street, and white people upon the other, or requiring white men's houses to be painted white, and colored men's black, or their vehicles or business signs to be of different colors, upon the theory that one side of the street is as good as the other, or that a house or vehicle of one color is as good as one of another color." (163 U. S. 537, 549-550). The application of this very standard to the facts of this case condemns the refusal of Texas to admit qualified applicants to its University Law School solely on grounds of color.

(4) The precise holding in *Plessy* was that a statute requiring the partitioning of white and colored people in an intrastate railroad train was not invalid under the Equal

Protection Clause. *Plessy* did not involve a statute requiring either the separation of races in the same school or the setting up of separate schools for white and colored students. Although the Court's opinion in *Plessy* contains words approving separate schools for white and colored, those words were obviously *dicta*—*dicta* based largely on *Roberts* v. *Cushman*, 5 Cush. (Mass.) 198 (1849), a case decided *before* the Civil War and *before* the Fourteenth Amendment.

Nor has this Court in any other case ever directly passed upon the validity of racial segregation in schools, or, more precisely, the validity of statutes requiring separate schools for white and colored. See BRIEF FOR THE UNITED STATES AS AMICUS CURIAE, ftnt. 31, p. 59, in *Shelley* v. *Kraemer* and *Hurd* v. *Hodge*, Oct. Term, 1947, Nos. 72, 87, 290 and 291; 334 U. S. 1 and 24 (1948).

In any event, if the holding in *Plessy* is deemed applicable to this case, we believe that *Plessy* should be overruled.

The foundations of the *Plessy* case have now all been undermined. It is clear now that *Plessy* is inconsistent with the guaranties of the Fourteenth Amendment. As this Court said in *Strauder* v. *West Virginia*, 100 U. S. 303, 306 (1880), the Fourteenth Amendment contains "a positive immunity, or right, most valuable to the colored race—the right to exemption from unfriendly legislation against them distinctly as colored; exemption from legal discrimination, implying inferiority in civil society, lessening the security of their enjoyment of the rights which others enjoy, and discriminations which are steps towards reducing them to the condition of a subject race."

The *Plessy* holding that segregation on intrastate trains is compatible with the Equal Protection Clause was based on two major erroneous assumptions.

(1) *Plessy* erroneously assumed that the distinction between whites and Negroes, on trains, rested on valid factual

differences and was "a reasonable regulation" with respect to which the State "is at liberty to act with reference to the established usages, customs and traditions of the people, and with a view to the promotion of their comfort, and the preservation of the public peace and good order" (p. 550). The unsoundness of that assumption has been conclusively demonstrated by the anthropological, educational, sociological and international developments from 1896 to 1949. Furthermore, it is obvious that the very purpose of the Fourteenth Amendment was to prevent the use of State authority to impose racial distinctions based on "established usages, customs and traditions." Moreover, this Court has clearly established, in the housing segregation cases, that State-imposed racial segregation cannot be "justified as proper exertions of state police power" for the "preservation of the public peace." *Shelley* v. *Kraemer*, 334 U. S. 1, 21 (1948); *Buchanan* v. *Warley*, 245 U. S. 60, 81 (1917). In addition, this Court has in recent years eloquently expressed the Constitutional infirmity of racial distinctions by government authority and has firmly established the principle that "Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality." *Hirabayashi* v. *United States*, 320 U. S. 81, 100 (1943); see *Shelley* v. *Kraemer*, 334 U. S. 1, 23 (1948); *Railway Mail Ass'n* v. *Corsi*, 326 U. S. 88, 94 (1945); *Steele* v. *Louisville & Nashville R. Co.*, 323 U. S. 192, 203, 208 (1944); *Korematsu* v. *United States*, 323 U. S. 214, 216 (1944); *Smith* v. *Texas*, 311 U. S. 128, 130 (1940); *Yick Wo* v. *Hopkins*, 118 U. S. 356, 374 (1886).

(2) The second erroneous assumption underlying *Plessy* was in the court's denial that "enforced separation of the two races stamps the colored race with a badge of inferiority" (p. 551). The fact is, however, that equal treatment is never seriously intended under a system of segregation.

The very purpose of racial segregation laws is to impose a symbolic superior-inferior caste system based on race which is totally independent of rational proofs or disproofs of any individual's capacities or abilities. The imposition of such caste status is itself discriminatory. Southern courts candidly recognize this when they award damages for "humiliation" to a white person who has been compelled to ride in the Negro section of a train,[3] or when they award damages to a white person who has been called "Colored."[4]

However, whatever may be said about the "equality" of segregated travel facilities on the same train, it is clear that the very fact of segregation in education by way of separate schools (complete *exclusion* from the University of Texas Law School in this case) results in inequalities of the opportunity to learn. Separation on a train, however obnoxious, cannot be equated with, nor its previous tolerance permitted to justify, racial discrimination in the opportunity to acquire a professional education, to raise one's status through education, and with that education to serve the community and the Nation. The record in this case proves that equal opportunity to acquire the knowledge, skills and techniques of the lawyer depends not only on instruction but on the association with fellow students of all races, creeds and walks of life. Indeed, whites as well as Negroes suffer from the denial of the opportunity to receive legal instruction in association with students of other races. No case previously before this Court has presented the situation where on the record it has been demonstrated that racial

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[3] *Louisville & N. R. Co.* v. *Ritchel*, 148 Ky. 701, 147 S. W. 411 (1912); *Missouri, K. & T. Ry. Co. of Texas* v. *Ball*, 25 Tex. Civ. App. 500, 61 S. W. 327 (1901); *Chicago, R. I. & P. Ry. Co.* v. *Allison*, 120 Ark. 54, 178 S. W. 401 (1915).

[4] *Flood* v. *News & Courier Co.*, 71 So. Car. 112, 50 S. E. 637 (1905); *Wolfe* v. *Georgia Ry. & Electric Co.*, 2 Ga. App. 499, 58 S. E. 899 (1907); *Collins* v. *Okla. State Hospital*, 76 Okla. 229, 184 Pac. 946, 947 (1919).

separation in education cannot supply equal education. This case squarely presents that situation for the first time.

Segregation means discrimination. This fact is commonly known. Both the Record in this case and every survey of the problem have proved it. The President's Committee on Civil Rights stated in its Report, *To Secure These Rights*, pp. 81-82; (Oct. 29, 1947):

> "Segregation has become the cornerstone of the elaborate structure of discrimination against some American citizens. Theoretically this system simply duplicates educational, recreational and other public services, according facilities to the two races which are 'separate but equal.' In the Committee's opinion this is one of the outstanding myths of American history for it is almost always true that while indeed separate, these facilities are far from equal. Throughout the segregated public institutions, Negroes have been denied an equal share of tax supported services and facilities. . . . No argument or rationalization can alter this basic fact: a law which forbids a group of American citizens to associate with other citizens in the ordinary course of daily living creates inequality by imposing a caste status on the minority group."

The President's Commission on Higher Education in its Report of December 11, 1947 (*Higher Education for American Democracy*, Vol. II, p. 31, Govt. Printing Off.) stated, in a section entitled *The Impact of Segregation on Higher Education for Negroes*:

> ". . . the separate and equal principle has nowhere been fully honored. Educational facilities for Negroes in segregated areas are inferior to those provided for whites. Whether one considers enrollment, over-all costs per student, teachers' salaries, transportation facilities, availability of secondary schools, or opportunities for undergraduate and graduate study, the consequences of segregation are always the same, and always adverse to the Negro citizen."

Gunnar Myrdal, in his brilliant and comprehensive study of the American Negro, *An American Dilemma, The Negro Problem and Modern Democracy,* Vol. I, p. 581 (1944), stated:

> "It is evident, however, and rarely denied, that there is practically no single instance of segregation in the South which has not been utilized for a significant discrimination. The great difference in quality of service for the two groups in the segregated set-ups for transportation and education is merely the most obvious example of how segregation is an excuse for discrimination. Again the Southern white man is in the moral dilemma of having to frame his laws in terms of equality and to defend them before the Supreme Court—and before his own better conscience, which is tied to the American Creed—while knowing all the time that in reality his laws do not give equality to Negroes, and that he does not want them to do so."

III. THERE IS NO EQUALITY IN THIS CASE

A second, and somewhat narrower question in this case, assuming the validity and applicability to education of the so-called "separate but equal" doctrine, is the extent to which the State may create unequal opportunities for education and yet satisfy the requirements of the Constitution. We think it not subject to doubt that the accommodations offered Sweatt were far inferior to those of the University of Texas Law School and we think that under the decisions of this Court in *Missouri ex rel. Gaines* v. *Canada,* 305 U. S. 337 (1939) and *Sipuel* v. *Board of Regents,* 332 U. S. 631 (1948), the State of Texas has failed to meet its constitutional obligation to the petitioner. If the decision of the court below in this respect is allowed to stand, the avenue would be open for all States to attempt to satisfy their obligations to supply equal education to Negroes by the "thin disguise" of makeshift and unequal schools.

IV. THE MANDATE WHICH WILL ISSUE TO IMPLEMENT THIS COURT'S DECISION

But AVC believes that the most important question presented in this case relates to the terms of the mandate that should be issued if this Court should reverse the decision of the court below.

Veterans, advanced in years by reason of their military service, must get their education *today* if at all, not at the termination of exhaustive legal proceedings. Veterans do not have the resources nor the time to file individual suits, eventually to be decided in this Court, and then start a subsequent suit on the meaning of the mandate, as occurred in *Sipuel* v. *Board of Regents*, 332 U. S. 631 (1948) and *Fisher* v. *Hurst*, 333 U. S. 147 (1948). If the constitutional promise of equality is to have meaning, it must mean actual equality of both the facilities and the time at which they are available. A decision which enunciates a bare theoretical requirement of equality, but leaves open to the courts below the opportunity for inequality in practice, cannot fulfill the constitutional requirement of equality. The interpretation which various states have placed on this Court's mandates in education segregation cases has virtually nullified the victory for nondiscrimination in education seemingly gained by this Court's decisions in *Missouri ex rel Gaines* v. *Canada, supra*, and *Sipuel* v. *Board of Regents, supra*. See *State ex rel. Gaines* v. *Canada*, 344 Mo. 1238, 131 S. W. (2d) 217 (1939); *Fisher* v. *Hurst*, 333 U. S. 147 (1948). The vitality of this Court's pronouncements on the Constitutional obligation of equality depends peculiarly, in this kind of case, on the nature of the mandate.

We believe that this Court's mandate should plainly require the State to admit Sweatt to the University of Texas

Law School at the opening of the next term following the issuance of the mandate.

AMERICAN VETERANS COMMITTEE

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